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Supreme Court of the United States

OCTOBER TERM, 1959

No. 579

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES,

Appellant,

vs.

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	PAGE
Statement as to jurisdiction	1
Opinion	2
Jurisdiction	2
Ordinance involved	2
Constitutional provisions invoked	4
Questions presented	4
Statement of the case	5
How federal questions raised and determined	5
Questions raised are substantial and of national importance	7
Substantiality	7
National importance	13
Conclusion	15
Appendix A—opinion of Supreme Court of New Jersey	16

Cases Cited

Allendale Congregation of Jehovah's Witnesses v. Grosman 30 N. J. 273, 152 A. 2d 569 (1959)	2
American Communications Association v. Douds 339 U. S. 382 (1950)	11
Appeal of Trustees of Congregation of Jehovah's Witnesses 183 Pa. Super. 219, 130 A. 2d 240 (1957)	10
Archbishop of Oregon v. Baker 140 Ore. 600, 15 P. 2d 391 (1932)	13
Board of Zoning Appeals v. Decatur, Indiana Company of Jehovah's Witnesses 233 Ind. 83, 117 N. E. 2d 115 (1954)	10, 13
Burstyn, Inc. v. Wilson 343 U. S. 495 (1952)	13

PAGE

Cantwell v. Connecticut
310 U. S. 296 (1940) 10, 13
Congregation Temple Israel v. City of Creve Coeur
320 S. W. 2d 451 (S. Ct. Mo. 1959) 10
Corporation of Presiding Bishop v. City of Porterville
90 Cal. App. 2d 656, 203 P. 2d 823 (1949) (appeal dismissed, 338 U. S. 805 (1949)) 10
Follett v. Town of McCormick
321 U. S. 573 (1944) 10
Kunz v. New York
340 U. S. 290 (1951) 10
Lovell v. City of Griffin
303 U. S. 444 (1938) 13
Milwaukie Company of Jehovah's Witnesses v. Mullen
214 Ore. 281, 330 P. 2d 5 (1958) (appeal dismissed and certiorari denied, 359 U. S. 436) 10
Minney v. City of Azusa
164 Cal. App. 2d 12, 330 P. 2d 255 (1958) (appeal dismissed, 359 U. S. 346) 10
Mooney v. Village of Orchard Lake
333 Mich. 389, 53 N. W. 2d 308 (1952) 11
Murdock v. Pennsylvania
319 U. S. 105 (1943) 10
Niemotko v. Maryland
340 U. S. 268 (1951) 10, 13
Redwood City Congregation of Jehovah's Witnesses v. City of Menlo Park
167 Cal. App. 2d 686, 335 P. 2d 195 (1959) 10
Roman Catholic Welfare Corp. v. City of Piedmont
45 Cal. 2d 325, 289 P. 2d 438 (1955) 11
Saia v. New York
334 U. S. 558 (1948) 13

Cases Cited *continued*

	PAGE
Schneider v. New Jersey 308 U. S. 147 (1939)	9, 13
Swift v. Borough of Bethel 355 U. S. 40 (1957)	10
State ex rel. Tampa, Florida Company of Jehovah's Witnesses v. City of Tampa 48 S. 2d 78 (S. Ct. Fla. 1950)	9
West Virginia State Board of Education v. Barnette 319 U. S. 624 (1943)	9

Statutes Cited

Constitution of the United States	
Amendment I	4, 5, 6, 7, 8, 9, 12, 14
Amendment XIV	4, 5, 6, 7, 8, 9, 12, 14
N. J. R. S. 40:55	6, 12
N. J. R. S. 40:55-32	5, 6, 12
N. J. R. S. 40:55-39	5, 6, 12
28 U. S. C. § 1257(2)	2
Zoning Ordinance, Borough of Allendale, New Jersey	
Article 4, Section 411	6, 12
Article 6, Section 601	7, 8, 12
Article 6, Section 605	2, 7, 8, 12
Article 15, Sections 1501, 1502	6, 12, 13

Other Authorities Cited

33 Brooklyn L. Rev. 185	11
44 Cal. L. Rev. 775, 777	11
70 Harv. L. Rev. 1428	11
15 Mich. L. Rev. 601, 602	11
27 St. Johns L. Rev. 93	11
3 St. Louis U. L. Jour. 265	11
3 U. C. L. A. L. Rev. 387, 391	11
53 W. Va. L. Rev. 301	11

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Appellees.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

This is an appeal from the judgment of the Supreme Court of New Jersey dated June 30, 1959. It holds constitutional an ordinance prohibiting the issuance of a permit to appellant to build a church within the Borough of Allendale, located within the AA Residential Zone. The ordinance provides for churches and other public buildings. The denial was upheld by the Supreme Court of New Jersey because the ample parking lot and the parking spaces thereon to accommodate the total congregation did not meet the unreasonably larger requirement of the ordinance which was specifically designed to prevent appellant from having a

church in the Borough of Allendale. This statement is submitted to show that this Court has jurisdiction of this appeal and that the questions presented are substantial.

OPINION

The opinion of the Supreme Court of New Jersey is reported (30 N. J. 273, 152 A. 2d 569). It is printed as Appendix A to this jurisdictional statement, *infra*, pages 16-22.

JURISDICTION

This case involves an appeal from a judgment dismissing a complaint in lieu of prerogative writs entered by the Superior Court, Law Division, Bergen County, New Jersey. [App. 9a] An appeal was taken to the Superior Court, Appellate Division. [App. 11a] The Supreme Court of New Jersey on its own motion ordered the case transferred and certified to it. The Supreme Court of New Jersey thereafter rendered and entered its judgment on June 30, 1959. (See Appendix A, *infra*, pages 16-22, *infra*.) A notice of appeal to this Court from said judgment was filed within the 90-day time limit on September 23, 1959. Pursuant to an order of the Chief Justice of the Supreme Court of New Jersey dated September 29, 1959, the time for filing the statement as to jurisdiction was extended to December 22, 1959. This Court has jurisdiction of this appeal under 28 U. S. C. § 1257(2).

ORDINANCE INVOLVED

The relevant portions of the ordinance involved are printed in the transcript of the record docketed in the Supreme Court of New Jersey as "Appendix to Brief for Appellant" at pages 294a-299a. A copy of this printed document is provided for each member of this Court. The main section of the ordinance involved in this case is Section 605. It reads as follows:

605. For buildings intended to be used in whole or part

as a theatre, auditorium, restaurant, hospital, sanitarium, church or other place of public assembly, or any similar purpose likely to attract a number of persons using motor vehicles, there shall be provided a usable area for off-street parking for one motor vehicle for each three seats installed or usable in the portion of such building used for any of the purposes stated in this section, plus one space for each person resident on the the premises, and additional spaces equal in number to 75% of the employees of such establishment. Additional parking area shall be provided for any portion used for other purposes as required by the other sections of this ordinance.

In determining seating capacity for computing parking requirements, there shall be counted such seats as are bolted or attached to the floor of the building. If seating capacity shall be of the bleacher type, the capacity shall be determined by allowing 2½ lineal feet of bleacher space as measured on the longitudinal axis of such seats as one seating space. If there be no permanent seats or bleachers, or if area is provided for portable seats, the calculation for the necessary parking requirements shall be made by the Building Inspector or his authorized or designated representative using the following table as a guide.

PARKING AREA REQUIREMENT

Principal Purpose	Square Feet of Parking Area per Square Foot of Usable Building Area
Assembly with fixed seats	10
Assembly without fixed seats	5
Business buildings	1
Court Rooms	2
Dance halls, lodge rooms	5
Hotel, lodging-houses, multi-family dwelling	1
Institutional buildings	1
Storage buildings	0.5

[App. 298a-299a]

CONSTITUTIONAL PROVISIONS INVOKED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

I.

Where appellant applied for a permit to build and use a church in the Borough of Allendale under the above ordinance, which permit was denied because there was not strict compliance with the off-street parking requirements of the ordinance (prescribing an excessive size of parking spaces and an unreasonable size of a parking lot) and where the undisputed evidence showed that there was an adequate parking area on the premises to accommodate the automobiles of all persons attending the church meetings, does the ordinance as thus construed and applied by the Supreme Court of New Jersey abridge appellant's right to freedom of religion and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States when it appears that (1) it is impossible under the terms of the ordinance for appellant to use the property as a

church although it is adequate for such purpose and (2) there is no showing that the public welfare, peace or safety of the community will be interfered with by the failure to comply literally with said off-street parking requirements of the ordinance?

II.

Do N. J. R. S. 40:55-32 and 40:55-39 and the Allendale Zoning Ordinance providing for the exercise of power by the Board of Adjustment confer unlimited discretion on the board to deny special use permits for churches so as to make them unconstitutional, as construed and applied to the facts of this case, by the action of the Board of Adjustment in denying the permit, because they abridge freedom of assembly and worship contrary to the First and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

The statement of the case including the nature of the action and the summary of the material facts is adequately made in the per curiam opinion of the Supreme Court of New Jersey, which is incorporated here as though copied at length herein. See Appendix A, *infra,* at pages 16-22.

HOW FEDERAL QUESTIONS RAISED AND DETERMINED

I.

In the complaint in lieu of prerogative writs filed in the Superior Court of New Jersey, Law Division, Bergen County, appellant alleged that the denial of the building permit constituted a denial of appellant's rights, contrary to the First and Fourteenth Amendments to the Constitution of the United States, and requested the court to declare "that the off-street parking provisions of the original ordinance and of the amendment thereto dated October 24.

1957, requiring car-parking space of certain sizes, shape and other arrangements, are unreasonable and burdensome requirements and without any reasonable relationship to the zoning powers of the Borough, which make the two ordinances on their face and as construed and applied to the facts of this case an abridgement and denial of Plaintiff's right of freedom of religion and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States." [App. 4a-5a]

II.

Appellant also requested the Superior Court of New Jersey, Law Division, Bergen County, to declare "that N. J. R. S. 40:55, 40:55-32 and 40:55-39 (which provide for the regulations to be promulgated by the Borough of Allendale, purposes of zoning and delegation of powers to the Board of Adjustment, all of which form the basis of the zoning ordinance of the Borough of Allendale and particularly Article 4, Section 411, Article 15, Section 1501 and Section 1502-a, and all other provisions of the said ordinance relied upon by the Building Inspector and the Board of Adjustment for the denial of the permit to build the place of religious assembly in this case) are unconstitutional as construed and applied because they are vague and indefinite, confer uncontrollable discretion not limited by any clear and definite standards and deny plaintiff its rights of property, freedom of religion and freedom of assembly, contrary to the First and Fourteenth Amendments to the Constitution of the United States." [App. 6a]

The Superior Court of New Jersey overruled the contentions of appellant. [App. 9a-10a, 346a-352a]

Appellant duly appealed to the Superior Court, Appellate Division, but the Supreme Court of New Jersey on its own motion promptly took the case out of its hands by certifying the case. The Supreme Court of New Jersey stated that it was "on our own motion." See Appendix A, *infra*, page 16.

These questions of the denial of freedom of assembly and freedom of worship, contrary to the First and Fourteenth Amendments, were expressly determined by the court below and extensively discussed by that court. [Appendix A, *infra*, pages 19-22] Each question upon this appeal raised under the United States Constitution or presented in this statement was specifically raised in the court below and passed upon adversely to the appellant by the court below. This Court should find that the questions raised must, therefore, be considered by this Court.

QUESTIONS RAISED ARE SUBSTANTIAL AND OF NATIONAL IMPORTANCE

Substantiality

I.

Sections 601 and 605 of Article 6A of the ordinance provide for one automobile parking space for each three seats in the church and in addition thereto command the size of the parking lot to be ten square feet for each square foot of usable area of the church. [App. 298-299a] Appellant provided for 30 automobile parking spaces on the lot having an area of 7,820 square feet. The Allendale Board of Adjustment illegally included the attic area and the basement area of the proposed church under the ordinance and calculated appellant would be required to have a parking lot 43,200 square feet in area.

Under a more realistic interpretation of the ordinance the required parking area would be 28,000 feet or slightly less than two-thirds of an acre of land, which could not be acquired by appellant. A plat received into evidence (Plaintiff's Exhibit P-11) showed that a literal enforcement of the ordinance requiring a parking lot would leave the appellant with no space on which to build the proposed church building. This made the lot useless to appellant for the purpose for which it was bought. This was to erect a church building, the only use appellant could make of the property. [App. 236a-242a, 313a]

The testimony of experts showed that the national standard size for parking spaces on parking lots was 8 feet by 18 feet and that the size was adequate. Appellant's plan showed 30 such spaces which would accommodate the average attendance at the church of between 90 and 100 persons. [App. 57a] Thirty of the members of the congregation were children. This reduced the average adult attendance to 70 persons. [App. 57a] The proposed church was designed to seat a maximum of 150 persons. The proof showed, however, that the average regular attendance would be a maximum of 120. [App. 91a] On rare occasions two or three times a year the attendance would be a maximum of 150, bringing into the residential section of Allendale where the church is proposed to be located only 15 cars over and above the 30 spaces provided for in the off-street parking area on the premises. [App. 70a-72a]

The adequate spaces appellant provided for parking on the premises miss the total the ordinance requires by 20 spaces. The shortage of 20 spaces and the fact that the total square feet of parking area is 20,180 feet or one-half acre under the minimum required by the ordinance would not prevent the proposed use of the off-street parking area from accommodating the usual attendance at the church meetings.

Section 601 and Section 605 of Article 6A of the ordinance are an unconstitutional burden and prohibition upon appellant's freedom of religion guaranteed by the First and Fourteenth Amendments. A church in the Borough of Allendale with a large membership and seating capacity of 750 persons and a floor area of 14,000 square feet for assembly purposes would need to have 250 parking spaces and a parking lot of 140,000 square feet or more than three acres.

In thickly populated areas with real estate so difficult to acquire it is a prohibition of freedom of religion to require a church to operate a parking lot as a condition precedent to the exercise of freedom of worship guaranteed by the Constitution. It amounts to an outright denial of the consti-

tutional right to have a church. The cost of such large parking lots in city areas would run into an astronomical figure. In some areas even a wealthy congregation—which is rare in this country—could not build a church building because the required parking area would not be available. No, not at any price!

Traffic control by off-street parking provisions of zoning ordinances in the case of churches has no reasonable relationship to the police power. Even if it be said to have any connection with the police power over commercial establishments such as super-markets, it is so remote that when weighed against the heavy provisions of the First and Fourteenth Amendments it is not sufficient in the case of churches to overcome the right of freedom of religion guaranteed by the First and Fourteenth Amendments to the United States Constitution.—*Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

There are other more direct, as well as conventional, means of controlling traffic without making churches operate parking lots and thus either restricting the number of churches or prohibiting them entirely. One of the witnesses testified in this case that stationing a policeman in the area, erecting a "slow" sign or establishing "no parking" areas would be preferred to barring a church. [App. 119a-120a, 214a] (Compare *State ex rel. Tampa, Florida Company of Jehovah's Witnesses* v. *City of Tampa*, 48 S. 2d 78 (S. Ct. Fla. 1950)) The indirect method of prohibiting and burdening a church with the responsibility of operating a parking lot is not allowed by the First and Fourteenth Amendments.

Without a place to assemble there cannot be religious worship. Unless a church can own real estate and use it as a place to assemble, which includes the right to construct a building, there can be no freedom of assembly to worship. A church building is as necessary to pulpit preaching as is the religious pamphlet to the street evangelist or the door-to-door missionary. Freedom of religion guarantees the

right to own property and use it as a place of assembly as much as it guarantees the right to use literature as a part of preaching.—Compare *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); and *Kunz* v. *New York*, 340 U. S. 290 (1951); with *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); and *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944).

The off-street parking provisions of the ordinance in question are not regulatory. They are prohibitory. This Court has jurisdiction in this case because there is a conflict of holdings as to the validity of off-street parking requirements for places of public assembly and churches. *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954), is in conflict with *Appeal of Trustees of Congregation of Jehovah's Witnesses*, 183 Pa. Super. 219, 130 A. 2d 240, (1957) (appeal dismissed, sub nom. *Swift* v. *Borough of Bethel*, 355 U. S. 40 (1957)), which is supported by the holding of the court below that off-street parking provisions of a zoning ordinance do not violate the constitutional rights of a church.

The cases of *Minney* v. *City of Azusa*, 164 Cal. App. 2d 12, 330 P. 2d 255 (1958) (appeal dismissed for want of a properly presented federal question, 359 U. S. 436); and *Milwaukie Company of Jehovah's Witnesses* v. *Mullen*, 214 Ore. 281, 330 P. 2d 5 (1958) (appeal dismissed and certiorari denied, 359 U. S. 436), are not in point. Neither of these cases involved denial of a permit to build a church solely because of failure to comply with the off-street parking provisions, as is the case here. Compare the *dictum* in *Congregation Temple Israel* v. *City of Creve Coeur*, 320 S. W. 2d 451, 456 (S. Ct. Mo. 1959); with the holding in *Redwood City Company of Jehovah's Witnesses* v. *City of Menlo Park*, 167 Cal. App. 2d 686, 335 P. 2d 195, 201-203 (1959).

The case of *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), ap-

peal dismissed 338 U. S. 805 (1949) (commented upon in *American Communications Association* v. *Douds*, 339 U. S. 382, 397-398 (1950)) is not in point. The case did not involve exclusion of churches from an entire municipality, as here, but the ordinance operated upon only a small portion of the city and prohibited churches in only one small exclusively residential area of the city. The case here is like *Mooney* v. *Village of Orchard Lake*, 333 Mich. 389, 53 N. W. 2d 308 (1952). Compare *Roman Catholic Welfare Corp.* v. *City of Piedmont*, 45 Cal. 2d 325, 289 P. 2d 438 (1955). See also 70 Harv. L. Rev. 1428; 44 Cal. L. Rev. 775, 777; 3 U.C.L.A. L. Rev. 387, 391; 27 St. Johns L. Rev. 93; 55 Mich. L. Rev. 601, 602; 33 Brooklyn L. Rev. 185; 53 W. Va. L. Rev. 301; 3 St. Louis U. L. Jour. 265.

Under the circumstances of this case this Court is obliged by the acts of Congress and the federal Constitution to take jurisdiction of this case and determine whether, as construed and applied to the particular facts, the right of the appellant and the members of the congregation to freedom of assembly and of worship has been denied or abridged. In discharging this function the United States Constitution commands this Court to look at substance and not at the shadows of the requirement for 50 parking spaces or the ten square feet requirement of the ordinance which calls for the unnecessary 20,180 additional square feet of parking space.

The failure to comply with these requirements has no reasonable relationship to the police power of the Borough of Allendale, in the denial of the application for a special use permit by the Board of Adjustment in this case. No public interest is involved or affected by such omission to comply with the strict terms of the parking lot law. The denial of the application because of the failure to have final plans showing 28,000 square feet of space for a parking lot, instead of the 30 spaces presently provided for, is an unconstitutional construction, application and enforcement of the above sections of the ordinance (Sections 601 and 605, Article

6A) relating to off-street parking contrary to the First and Fourteenth Amendments to the United States Constitution.

II.

N. J. R. S. 40:55, 40:55-32 and 40:55-39 and Article 4, Section 411 and Article 15, Sections 1501 and 1502 of the Allendale Zoning Ordinance confer unlimited discretion on the Board of Adjustment to deny special use permits for churches so as to make them unconstitutional, as construed and applied to the facts in this case; since the provisions are vague and indefinite, the denial of the permit by the Board of Adjustment could not be controlled by definite standards of the law and it denied appellant the rights of assembly and worship contrary to the First and Fourteenth Amendments to the Constitution of the United States.

The above specified sections of the Revised Statutes of New Jersey make no effort to lay down the standards for the exercise of discretion by a Board of Adjustment under a zoning ordinance. The discretion conferred is unlimited by the statute and nothing appears therein whereby an exercise of such discretion can be controlled. Sections 1501 and 1502 of the ordinance are equally vague and indefinite and confer dragnet discretion upon the Board of Adjustment. [App. 297a-298a] Section 411 in specifying the various things that can be considered by the board in denying a special use permit also confers dragnet unconstitutional discretion on the board because the terms of said section are vague and indefinite and lay down no standards by which the denial of a special use permit can be reviewed judicially.

Section 411 uses the terms "exceptional risks of traffic congestion or public safety" and provides that if the design of the building is "markedly incongruous" then the Building Inspector may refuse the permit and refer the application to the Board of Adjustment. The eleven findings of the Board of Adjustment based upon these provisions and the off-street parking provisions prove how vague and indefinite the ordinance is. [App. 302a-306a] Section 411 is a

dragnet. Sections 1501 and 1502 confer unlimited discretion on the Board of Adjustment to either deny or grant the permit within the whim and caprice of the members of the board.

The illegal and arbitrary treatment by the Board of Adjustment of the application for a permit to build and operate a church demonstrates the unlimited delegation of authority and unconstitutional granting of discretion to the Board of Adjustment by the ordinance as construed and applied. The enforcement of the ordinance by the Board of Adjustment therefore makes the ordinance itself unconstitutional.—*Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *New Jersey*, 308 U. S. 147, 161, 162, 163 (1939); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); see also *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 223 Ind. 83, 117 N. E. 2d 115 (1954); *Archbishop of Oregon* v. *Baker*, 140 Ore. 600, 15 P. 2d 391 (1932).

National Importance

It does not require extensive argument to demonstrate the importance of the questions presented upon this appeal. The burgeoning of cities and towns spreads them into the suburban and rural areas of the nation. This brings with it millions of new homes and millions of people. Simultaneously it carries the need of public facilities, such as police stations, fire houses, water works, libraries, schools and churches. Churches are quasi-public in nature. They are as much an asset to the community as any other public buildings. They promote public morals and contribute to the general welfare of every community.

Churches have been built in residential areas of the finest kind of all cities for centuries. Churches have never been found to be a menace to the rights of the public. They are the means whereby proper respect for morals is instilled. So important are churches that every state of the nation

has expressly provided in its constitution for the exemption of churches from payment of real estate taxes. They bear in democratic lands burdens that are performed by the state in communistic countries. Were it not for the work of churches the state and federal governments in this nation would be required to establish new federal and state welfare institutions and other new agencies.

The building of new communities, the establishment of new cities and the expansion of suburbs around all cities, small and large, throughout the nation have also brought with them an increase in zoning laws. Thousands of municipalities have adopted as a part of their zoning laws provisions for off-street parking requirements for places of public assembly, such as churches. They have also provided for the granting of building permits by administrative bodies under such zoning ordinances without any provisions for administrative control of exercise of discretion by such bodies, as the ordinance in this case does not provide.

Involved in this case are questions of great public importance. They are of nationwide interest because of the conflict between—

(1) Provision of the zoning laws requiring off-street parking and

(2) Provision allowing some administrative body to grant a permit in its unlimited discretion

with the First and Fourteenth Amendments.

The importance of this case to all the people who rely upon freedom of religion in this country is demonstrated by the consequences of allowing the judgments of the courts below to stand. To approve the judgments thereby approves the portions of the ordinance that have been challenged in this case. If this Court does not take jurisdiction in this case and thereafter reverse the judgments of the courts below, then it means that all municipalities exercising zoning power will have unlimited authority to repeal the parts of the Constitution that guarantee freedom of religion.

The opinions of the courts below approving the uncon-

stitutional provisions of the zoning ordinance in this case, if allowed by this Court to become the law of the land, will give the green light to all municipalities who desire to do so to drive churches out of all urban areas into the faraway rural places. Churches will be forced out into or among the cotton patches, corn and wheat fields, meadows and forests. Surely the great and small cities of the United States—beset as they are with exploding problems of delinquency and crime—are not thus to be divested of these religious bulwarks against increasing immorality and lawlessness: churches located in all residential areas. While it is true that some religious orders take to the wilderness and isolate themselves from people, most churches are to be found only where there are people living close together.

Thickly populated areas and churches go together. But the consequences of the holding of the court below are to put an end to this twin relationship. The effect of this space-age sophistry also is to institute a trend that begins the attrition of freedom of religion which may—if not stopped when there is yet time—some day bring the end to freedom of religion as it was known and envisaged by the authors of the Constitution.

CONCLUSION

For the reasons above stated, this Court should conclude and order that the questions involved are substantial and of nationwide public importance so as to warrant the noting of jurisdiction. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submitted,

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December, 1959.

APPENDIX A

SUPREME COURT OF NEW JERSEY

No. A-132, September Term, 1958

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES,

Plaintiff-Appellant,

vs.

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,

Defendants-Respondents.

Argued June 2, 1959. Decided June 30, 1959.
Mr. Hayden C. Covington of the New York Bar argued the cause for the appellant (Mr. Daniel W. Kamp, Attorney).
Mr. James J. Dooley argued the cause for the respondents (Mr. George Winne, Attorney).

PER CURIAM

On February 11, 1959 the Law Division entered judgment for the defendants and thereafter the plaintiff appealed to the Appellate Division. We certified the matter on our own motion. See *R.R.* 1:10-1(a).

Since 1951 the Allendale Congregation of Jehovah's Witnesses has been conducting its meetings in a store located at 78 West Allendale Avenue, Allendale, New Jersey. In 1957 it applied for a permit to build a meeting hall on a lot in an AA residential zone. The lot is irregular in shape and is less than 1/2 acre in size. It fronts on Hillside Avenue in a forty mile per hour speed zone near a 60-degree road bend. The building inspector found that the use proposed by the applicant would create "exceptional risk of

traffic congestion and public safety", that the design and construction of the proposed building would be "markedly incongruous with the character of the neighborhood" and that the applicant's plans and specifications did not meet certain requirements regarding parking facilities and failed to provide "sufficient off-street parking areas and spaces". On August 15, 1957 the building inspector rejected the application and thereafter the plaintiff appealed to the Board of Adjustment. In its presentation to the Board, the plaintiff confined its attention to the Borough's original zoning ordinance of 1952 and expressed its lack of concern with an amending ordinance which had been duly adopted by the Borough during the course of the hearings before the Board. On April 26, 1958 the Board sustained the building inspector's denial of the plaintiff's application and in due course the plaintiff filed its complaint in lieu of prerogative writ. See *R.R.* 4:88. The Law Division, in rendering its judgment for the defendants, did not rely on the provisions of the original zoning ordinance of 1952 or on the findings of the building inspector thereunder but rested its determination on the plaintiff's acknowledged noncompliance with the provisions of the amendatory ordinance.

The amendatory ordinance took effect on October 24, 1957 and provides in section 605 that where a building is intended to be used "as a theatre, auditorium, restaurant, hospital, sanitarium, church or other place of public assembly, or any similar purpose likely to attract a number of persons using motor vehicles, there shall be provided a usable area for off-street parking for one motor vehicle for each three seats installed". Section 609 provides that "an area of 200 square feet, exclusive of driveways, is hereby determined as the minimum space necessary for the parking of a single motor vehicle". It is not disputed that the plaintiff's proposed premises would be a church or other place of public assembly with fixed seats within the meaning of the amendatory ordinance and that its plans and specifications failed to comply with either of the quoted require-

ments of the amendatory ordinance relating to off-street parking. When Judge Waesche asked, in the Law Division, whether the plaintiff was within or in violation of section 605, counsel for the plaintiff replied "we are in violation of it". Later when counsel for the plaintiff urged that the ordinance was unconstitutional and prohibitory, Judge Waesche expressed the view that a regulation requiring off-street parking for church premises along with other places of public assembly is entirely lawful, provided its terms are reasonable, and he afforded to counsel for the plaintiff an opportunity to introduce testimony that the requirement for a parking space for each three seats and the related parking requirement were unreasonable. The opportunity was not availed of and no further testimony was introduced. Before the Board of Adjustment, a planning consultant who testified for the plaintiff as an expert witness on its behalf, stated that there was "no question" in his mind that an ordinance requiring a parking space for each three seats "would be reasonable", and the plaintiff's minister testified that the attendance at its West Allendale Avenue premises has heretofore averaged about 3-1/4 persons for each car. A planning consultant who testified in opposition to the plaintiff's application stated that "it is very common in zoning for off-street parking to designate an area of 200 square feet as a parking area for one motor vehicle".

The plaintiff's application does not comply with the amendatory ordinance nor does it seek a specific variance from its terms under the statutory standards set forth in *R.S.* 40:55-39. And apparently the plaintiff does not seek to establish arbitrary discrimination aimed by the Borough at Jehovah's Witnesses which this court would, of course, be alert to strike down; indeed during oral argument, counsel for the plaintiff acknowledged that the only evidence suggestive of such discrimination was the passage itself of the amendatory ordinance while the plaintiff's appeal was being heard by the Board of Adjustment. But it is well

settled in our State that a municipality's conduct in increasing its general zoning restrictions while action is being awaited on a pending application will, in the absence of a showing to the contrary, be presumed to have been in good faith and for the public interest and be deemed lawfully controlling on the application. See *Crecca* v. *Nucera*, 52 N.J. Super. 279, 283 (App. Div. 1958); *Roselle* v. *Moonachie*, 48 N.J. Super. 17, 21 (App. Div. 1957), *on rehearing*, 49 N.J. Super. 35, 41 (1958); *Roselle* v. *Wright*, 37 N.J. Super. 507, 515 (Law Div. 1955), *aff'd*, 21 N.J. 400 (1956); *Rodee* v. *Lee*, 14 N.J. Super. 188, 191 (Law Div. 1951); *Concord Garden Apartments* v. *Board of Adjustment*, 1 N.J. Super. 301, 305 (App. Div. 1949); *Socony-Vacuum Oil Co., Inc.* v. *Mt. Holly Twp.*, 135 N.J.L. 112, 117 (Sup. Ct. 1947).

The plaintiff's real contention is that the off-street parking requirements of the amendatory ordinance are invalid on their face and as applied because they abridge "freedom of assembly and worship contrary to the state and federal constitutions". We consider this contention to be without merit. The off-street parking requirements are made indiscriminately applicable to all buildings where substantial numbers of people are likely to gather via private motor vehicles and are well designed to promote the public safety and general welfare by lessening "congestion in the streets". See *R.S.* 40:55-32; *James* v. *Bd. of Adjustment of Town of Montclair*, 40 N.J. Super. 206, 212 (Law Div. 1956); 2 *Rathkopf, the Law of Zoning and Planning* 397 (3rd ed. 1956). They do not restrict the plaintiff's freedom of worship and assembly at its present quarters or at any suitable quarters in the AA residential zone or in any of the other zones in the Borough or even at the plaintiff's relatively small lot on Hillside Avenue if its plans are altered to reduce its proposed seating capacity and increase its proposed off-street parking facilities so as to comply with the terms of the amendatory ordinance. On the record before us we are not at all at liberty to say that the requirements have not been imposed in good faith and for the public interest or

that they are unnecessary or excessive or that they are not substantially related to the promotion of the public safety and general welfare; they appear to come well within the principles expressed in cases which have heretofore held that property used for church purposes, along with property used for other purposes, may be lawfully subjected to reasonable zoning restrictions. See *Kurman* v. *Zoning Board of Adjustment, Etc.*, 351 Pa. 247, 40 A. 2d 381 (1945); *Galfas* v. *Ailor*, 81 Ga. App. 13, 57 S. E. 2d 834 (1950); *cf. Congregation Temple Israel* v. *City of Creve Coeur*, 320 S.W.2d 451, 456 (Mo. 1959); *Milwaukie Co. of Jehovah's Witnesses* v. *Mullen*, 330 P. 2d 5 (Ore. 1958), *appeal dismissed*, 359 U. S. 436, 3 L. Ed. 2d 932 (1959); *Minney* v. *City of Azusa*, 330 P. 2d 255 (Cal. Dist. Ct. App. 1958), *appeal dismissed*, 359 U. S. 436, 3 L. Ed. 2d 932 (1959); *O'Brien* v. *City of Chicago*, 347 Ill. App. 45, 105 N. E. 2d 917, 920 (1952); *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), *appeal dismissed for want of a substantial federal question*, 338 U. S. 805, 94 L. Ed. 487 (1949); *Crolly, Regulation of the Location of Churches by Municipal Zoning Ordinances*, 23 *Brooklyn L. Rev.* 185, 199 (1957); *Note, Exclusion of Churches from Residential Areas*, 55 *Mich. L. Rev.* 601 (1957); *Note, Churches and Zoning*, 70 *Harv. L. Rev.* 1428 (1957).

In *Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit*, 183 Pa. Super. 219, 130 A. 2d 240, 243 (1957), *appeal dismissed for want of a substantial federal question*, 335 U. S. 40, 2 L. Ed. 2d 71 (1957), the Borough of Bethel had adopted an ordinance which contained an off-street parking requirement applicable to churches, schools, auditoriums, stadiums and similar places of assembly; it also provided that no such places shall be permitted within 1/4 mile of each other. In a decision adverse to the appellant Jehovah's Witnesses, the Board of Adjustment found that its proposed church premises violated the off-street parking requirement and the 1/4 mile

requirement. The Pennsylvania court, in sustaining the Board's decision, first noted that each of the requirements bore a reasonable relation to the safety of public and then made these comments which are fully applicable here:

> "Certainly freedom of worship does not mean that churches are exempt from reasonable police power regulations. Our Supreme Court in *Kurman* v. *Zoning Board of Adjustment of City of Philadelphia*, 351 Pa. 247, 40 A. 2d 381 determined that setback requirements are applicable to properties used for church purposes. The concepts of religious freedom, freedom of speech and the press which are embodied in the First Amendment have never been construed as absolute rights and beyond the power of reasonable regulation under the police power. *Board of Zoning Appeals of Decatur* v. *Decatur, Ind. Co. of Jehovah's Witnesses, Ind.*, 117 N. E. 2d 115 123. The language used at page 123 [dissenting opinion] is applicable to the present case: 'It is quite evident that the members of the appellee could be killed just as dead going to and from church as going to and from a theater or a basketball game. It is a proper exercise of the police power to protect appellee's members from their own negligence as well as from the negligence of the traveling public. There would be just as much logic in holding that the members of appellee when going to church were not required to comply with the traffic regulations as in holding that the appellee is not required to make reasonable provisions for a lessening of the traffic hazards by off-street parking.
>
> 'If it was a proper exercise of the police power for the city by its zoning ordinance to require the appellee to comply with the average setback line of the residences, which only has a very remote bearing on traffic hazards, a fortiori it was a reasonable exercise of the police power to require appellee to provide space for 25 cars to park off the streets. The right of appellee

to exercise its religious freedom is not violated in either case.'"

See *Sexton* v. *Bates*, 17 N. J. Super. 246, 256 (Law Div. 1951), *aff'd* 21 N. J. Super. 329 (App. Div. 1952); *cf. Yanow* v. *Seven Oaks Park, Inc.*, 11 N. J. 341 (1953); *Ranney* v. *Istituto Pontificio Delle Maestre Filippini*, 20 N. J. 189 (1955).

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM,

No. 579.

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES,

Appellant,

vs.

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION TO DISMISS APPEAL, BRIEF AND APPENDIX IN SUPPORT OF MOTION TO DISMISS APPEAL.

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TABLE OF CONTENTS.

Contents of Brief.

	PAGE
MOTION TO DISMISS APPEAL	1
COUNTER-STATEMENT OF QUESTIONS PRESENTED	2
COUNTER-STATEMENT OF CASE	3
ORDINANCE INVOLVED	3
ARGUMENT:	
I. The validity of the Allendale Zoning Ordinance in respect to off-street parking requirements for assembly buildings as applied to appellant's proposed church in a residential district presents no substantial federal question	4
II. The constitutionality of R. S. 40:55-32 and R. S. 40:55-39 present no substantial federal question	6
III. The New Jersey Courts found no factual basis to declare the Allendale ordinance unreasonable which is dispositive of the case on a non-federal basis	9
CONCLUSION	11

CASES CITED.

American Communications Assn. v. Douds, 339 U. S. 382, 397, 398 (1950)	2, 5
Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethal Unit, from the Decision of the Board of Adjustment of the Borough of Bethal, Allegheny Co., Pa., 183 Pa. Super. 219, 130 A. 2d 240 (Super. Ct. 1957), allocatur den. by Pa. Supreme Ct. (1957), appeal dismissed for want of a substantial Federal question, 355 U. S. 40 (1957)	1, 4, 5

PAGE

Corporation of Presiding Bishop v. *Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949); appeal dismissed 338 U. S. 805; rehearing denied 338 U. S. 939 ..... 1, 4, 5, 6

Cummins v. *Board of Adjustment of the Borough of Leonia*, 39 N. J. Super. 452 (App. Div. 1956) 11

Monmouth Lumber Co. v. *Ocean Township*, 9 N. J. 64 (1952) 7

Tomko v. *Vissers*, 21 N. J. 226, 239 (1956) 11

Ward v. *Scott*, 11 N. J. 117 (1952) 7, 8

Yanow v. *Seven Oaks Park Inc.*, 11 N. J. 341 11

CONSTITUTION OF UNITED STATES CITED.

Amendment I 2
Amendment XIV 2

STATUTES CITED.

R. S. 40:55-32 ..... 6, 7
R. S. 40:55-39 ..... 2, 6, 7

Zoning Ordinance of the Borough of Allendale:
Article 4—Section 411 7
Article 6—Section 605 9
Article 6—Section 609 9
Article 15—Section 1501 7
Article 15—Section 1502 7

Contents of Appendix.

Exhibit D-1—Ordinance Borough of Allendale 1a

IN THE

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OCTOBER TERM,

No. 579.

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES,
Appellant,

vs.

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,
Appellees.

Motion to Dismiss Appeal.

Appellees, Borough of Allendale, New Jersey, and Edwin W. Grosman and Board of Adjustment of the Borough of Allendale, by their counsel, hereby move that this appeal be dismissed on the following grounds:

1. No substantial federal question is presented.

(*Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethal Unit, from the Decision of the Board of Adjustment of the Borough of Bethal, Allegheny Co., Pa.*, 183 Pa. Super. 219, 130 A. 2d 240 (Super. Ct. 1957), allocatur den, by Pa. Supreme Ct. (1957), appeal dismissed for want of a substantial Federal question, 355 U. S. 40 (1957).)

(*Corporation of Presiding Bishop* v. *Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949); appeal dismissed 338 U. S. 805; rehearing denied 338 U. S.

939. Dismissal explained in *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 397, 398 (1950).)

2. The judgment rests upon adequate non-federal grounds.

Printed herewith is Appellees' Brief in Support of Motion to Dismiss Appeal.

Counter-statement of Questions Presented.

A. Where a municipal zoning ordinance expressly permits churches to be erected in all zones in the Borough, including an "AA Residential Zone", but requires that all places of assembly, including churches, must meet off-street parking requirements, are such requirements as applied to a church contrary to the First and Fourteenth Amendments of the Constitution of the United States?

B. Where Appellant concedes its non-compliance with the applicable ordinance and did not seek a variance from its terms as required by R. S. 40:55-39, but bases its contentions solely on an alleged prohibition against churches by reason of off-street parking requirements of the zoning ordinance, is there a substantial federal question regarding the validity of a State statute or municipal ordinance presented?

C. Where Appellant was offered the opportunity below to present additional evidence regarding the reasonableness of the ordinance parking requirements and failed to avail itself of this opportunity, and no evidence was offered as to the unreasonableness of the ordinance is not this dispositive of the case on adequate non-federal grounds?

Counter-statement of the Case.

The statement of the case, including a summary of material facts, is adequately included in the opinion of the Supreme Court of New Jersey which is incorporated in Appellant's Appendix "A" at pages 16 to 22.

Ordinance Involved.

Portions of the ordinance concerned are printed in the transcript of the record docketed in the Supreme Court of the State of New Jersey as "Appendix to Brief for Appellant" at pages 294a to 299a, copies of which have been furnished to this Court as indicated by Appellant's Statement as to Jurisdiction (J. S. 2). Appellant has omitted pertinent provisions of the ordinance involved. Accordingly, Appellees have added Sections 606 to 611, the remaining provisions of the parking ordinance and have printed same herein (see Appendix 1 this Brief).

ARGUMENT.

I.

The validity of the Allendale Zoning Ordinance in respect to off-street parking requirements for assembly buildings as applied to appellant's proposed church in a residential district presents no substantial federal question.

The instant appeal should be dismissed because this Court has heretofore determined that the validity of off-

street parking requirements of a zoning ordinance applied uniformly to all places of assembly, including churches, presents no substantial federal question. *Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethal Unit, from the Decision of the Board of Adjustment of the Borough of Bethal, Allegheny Co., Pa.*, 183 Pa. Super. 219, 130 A. 2d 240 (Super. Ct. 1957), allocatur den. by Pa. Supreme Ct. (1957), appeal dismissed for want of a substantial Federal question, 355 U. S. 40 (1957). *Corporation of Presiding Bishop* v. *Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949); appeal dismissed 338 U. S. 805; rehearing denied 338 U. S. 939.

The *Bethal* case as noted by the Supreme Court of New Jersey in its opinion sub judice, is fully applicable here since it concerned the validity of off-street parking as applied to churches and the relationship of almost identical requirements to public safety (J. S. 21). As stated by the Pennsylvania Supreme Court (130 A. 2d at p. 243):

> "Certainly freedom of worship does not mean that churches are exempt from reasonable police power regulations. Our Supreme Court in Kurman *v.* Zoning Board of Adjustment of City of Philadelphia, 351 Pa. 247, 40 A. 2d 381 determined that setback requirements are applicable to properties used for church purposes. The concepts of religious freedom, freedom of speech and the press which are embodied in the First Amendment have never been construed as absolute rights and beyond the power of reasonable regulation under the police power. Board of Zoning Appeals of Decatur *v.* Decatur, Ind. Co. of Jehovah's Witnesses, Ind., 117 N. E. 2d 115, 123. * * *"

The dismissal of the Appellant's appeal in the *Bethal* case would appear to establish beyond question that subjecting land and buildings used by religious groups to the purview of reasonable zoning is constitutional.

The *Porterville* case involved even more stringent zoning as to churches since the use was excluded entirely from one family residential districts. This Court in commenting upon the *Porterville* case in the later case of *American Communications Ass'n* v. *Douds, supra,* said at page 397:

> "When the effect of a statute or ordinance upon the exercise of a First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring the showing of imminent danger to the security of the nation is an absurdity. *We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints *v.* City of Porterville, 1949, 338 U. S. 805." (Emphasis supplied).

Appellant in its jurisdictional statement at p. 11 attempts to distinguish the *Porterville* case by stating that "the case did not involve exclusion of churches from an entire municipality as here but the ordinance operated only upon a small portion of the City and prohibited churches only in one small exclusively residential area of the City". The attempted distinction is without merit since the Allendale ordinance permits churches in all districts of the Borough (Pl. Ex. 6, R295a-30; 296a-25), provided only that there be compliance with zoning requirements as to lot size,

setback, off-street parking, traffic safety and other reasonable regulations. The impact of the Allendale ordinance upon church buildings is obviously milder than that of the ordinance involved in the *Porterville* case. It would appear that the ordinance sub judice is a fortiori valid and constitutional.

The Appellant here in reality seeks discrimination in favor of churches in zoning matters by reason only of the religious character and purpose of the structure involved. This was the basis of the Appellant's case before the Supreme Court of New Jersey. That Court decided that Appellant's contentions in respect to an abridgment of the First Amendment freedoms were not meritorious, and determined that the Allendale ordinance applied uniformly to all assembly buildings and was designed to promote public safety and the general welfare by lessening traffic congestion (J. S. 19).

II.

The constitutionality of R. S. 40:55-32 and R. S. 40:55-39 present no substantial federal question.

The Supreme Court of New Jersey, in its opinion rendered in this case, observed that the Appellant did not seek a variance from the terms of the parking ordinance but rather based its attack solely upon the alleged unconstitutionality of the ordinance by reason of Appellant's status as a religious community (J. S. 18). Appellant further contends that the action of the Allendale Board of Adjustment in enforcing the zoning ordinance in respect to parking provisions is unconstitutional. The Board of Adjust-

ment is, of course, bound to enforce all provisions of the Borough zoning ordinance unless its discretion to grant a variance is properly invoked by presentation of evidence of hardship in accordance with the standards set forth in R. S. 40:55-39. In this connection the Appellant attacks the Enabling Acts under which the Board of Adjustment functions (R. S. 40:55-32 and R. S. 40:55-39) and those sections of the Allendale zoning ordinance expressing at a municipal level the powers and purposes of the aforesaid Enabling Acts. (Sections 411, 1501, 1502 of the Allendale Zoning Ordinance). (Pl. Ex. 6, R294a, 296a, 297a).

The constitutionality of R. S. 40:55-32 and R. S. 40:55-39 was considered at length by the Supreme Court of New Jersey in *Monmouth Lumber Co.* v. *Ocean Township*, 9 N. J. 64, 87 A. (2) 9 (1952), and *Ward* v. *Scott*, 11 N. J. 117, 93 A. (2) 385 (1952): In these cases the Court emphatically determined the sufficiency of these statutory enactments in establishing standards for the exercise of the powers granted and that such standards met constitutional requirements. In so finding the Court, in the *Ward* case, by Mr. Justice Jacobs at page 125, said:

> "• • • Applying the above to the terms of our Zoning Act, we find that the Legislature has not in any sense granted uncontrolled power to the administrative agency. It expressly set forth in R. S. 40:55-32 the proper zoning purposes to be achieved including the lessening of congestion, the securing of safety from fire, panic and other dangers, the providing of adequate light and the prevention of over-crowding, the avoidance of undue concentration of population, and the promoting of health, morals or general welfare. It recognized that comprehen-

> sive restrictive regulations designed to carry out these goals, if rigidly and literally enforced without any opportunity whatever for relief in special situations, might result in serious injustice or impairment of the underlying public purposes; accordingly, it wisely adopted the policy expressed in R. S. 40:55-39 which enables individual variances consistent with the public interest and the purposes of the zone plan and zoning ordinance. With equal wisdom it provided specific safeguards to insure against unwarranted or arbitrary action and untrammeled administrative discretion."

and again at page 127:

> "* * * Nor do we see any real danger that unwarranted or arbitrary action will successfully survive the ample safeguards which are ever available * * *".
>
> "* * * It seems clear to us that sympathetic consideration of the applicable legal principles in the light of the problems confronting the Legislature in its endeavor to deal fairly and effectively with the entire zoning field dictates the conclusion that R. S. 40:55-39 (d), as construed in the Monmouth Lumber case, embodies governing standards sufficient to withstand the constitutional attack advanced by the appellant * * *".

It would appear that the Appellant's constitutional argument as to the Board of Adjustment powers granted by the aforesaid Legislative Acts is based upon the same contention of immunity of church groups by reason of their religious character which was the basis of its attack on the off-street parking requirements of the zoning ordinance.

III.

The New Jersey courts found no factual basis to declare the Allendale Ordinance unreasonable which is dispositive of the case on a non-federal basis.

Plans submitted with Appellant's application for a building permit indicate a proposed church building designed to accommodate 150 persons (R29a-30). Appellant concedes there would be permanent seating installed on the premises to accommodate such a group. The proposed building plan indicates a floor area of 3460 square feet, including attic and basement (R85a-40). 2800 square feet constitutes the main floor area (R85a-10). The proposed parking area indicates a net footage of 4340 square feet (R86a-5), including 30 parking stalls (R85a-30) of 144 square feet each (R129a-30), with the negligible balance of the footage apparently being allotted to driveways. Testimony at the Board of Adjustment hearing indicated the impracticality of these measurements since they would prohibit movement within the parking area, as well as ingress and egress (R16a-25, R159a-160a).

Section 605 of the Allendale ordinance requires a useable parking area for one motor vehicle for each three installed seats (Pl. Ex. 6, R298a-35). Section 609 of the ordinance requires each parking stall to be 200 square feet, exclusive of driveways (Appendix I this brief, page 6a). Expert testimony from Appellee's witnesses, and in part from Appellant's; verified the reasonableness of these requirements (R204a; R72a-10). Applying sections 605 and 609 to the appellant's proposed structure would require a parking

area sufficient to accommodate fifty vehicles (150 installed seats) or an area of 10,000 square feet plus additional footage for driveways. The record does not appear to support Appellant's statement that they were required to provide a parking area of 43,200 square feet or even 28,000 square feet (J. S. 7).

At the trial before the law division of the Superior Court of New Jersey Appellant admitted its non-compliance with the ordinance (R362a-35). The Trial Judge, during the course of the trial and in his opinion rendered from the Bench at the conclusion of the case indicated that he considered the only question of any possible merit before him was the reasonableness of the ordinance parking requirements (R347a-20). He pointed out that there was no evidence before him as to the unreasonableness of the ordinance, and therefore, afforded Appellant an opportunity to present such evidence (R348a). Appellant failed to avail itself of the afforded opportunity and in the absence of a showing of unreasonableness the Appellant's application was denied (R350a-20). The Supreme Court of New Jersey affirmed the position of the Trial Judge (J. S. 18). Appellees now submit that the case can be disposed of on this ground alone.

It is axiomatic that a zoning ordinance is presumptively valid and reasonable and that the burden is upon the one who attacks the ordinance to show clearly that it is unreasonable. This rule is well settled in New Jersey and the presumption of validity attaches not only to the ordinance but also to the action of local administrative groups such as the Board of Adjustment in enforcing the ordinance and in the exercise of the expert discretion vested in such

Boards by the Legislature of the State of New Jersey. *Tomko* v. *Vissers*, 21 N. J. 226, 239, 121 A. (2) 502 (1956); *Cummins* v. *Board of Adjustment of the Borough of Leonia*, 39 N. J. Super. 452, 121 A. (2) 405 (App. Div. 1956); *Vanow* v. *Seven Oaks Park Inc.*, 11 N. J. 341, 36 A. (2) 639 (1953).

Conclusion.

We submit that this appeal should be dismissed for want of substantiality and by reason of adequate non-federal grounds.

Respectfully submitted,

GERALD MONOGHAN,

LEYDEN & MONOGHAN,

GEORGE WINNE,

Counsels for Appellees.

APPENDIX I.

Exhibit D-1.

Borough of Allendale.

NOTICE

NOTICE IS HEREBY GIVEN that the following proposed ordinance was introduced and passed on first reading at a regular meeting of the Governing Body of the Borough of Allendale, Bergen County, New Jersey, held on the 10th day of October 1957, and that said ordinance will be taken up for further consideration for final passage at a meeting of said Governing Body to be held at its meeting room in the War Memorial Building, at Allendale, New Jersey, on the 24th day of October, 1957, at 8:30 P. M. or as soon thereafter as the matter can be reached, at which time and place all persons who may be interested therein will be given an opportunity to be heard concerning the same.

J. FRANK ROUAULT,
Borough Clerk.

The ordinance referred to is as follows:

ORDINANCE

"AN ORDINANCE TO AMEND AN ORDINANCE ENTITLED 'AN ORDINANCE LIMITING AND RESTRICTING TO SPECIFIED DISTRICTS AND REGULATING THEREIN BUILDINGS AND STRUCTURES, ACCORDING TO THEIR CONSTRUCTION AND THE VOLUME AND EXTENT OF THEIR USE; REGULATING AND RESTRICTING THE HEIGHT, NUMBER OF STORIES AND SIZE OF BUILDINGS AND OTHER STRUCTURES; REGULATING AND RESTRICTING THE PERCENTAGE OF LOT OCCUPIED, THE SIZE OF YARDS, COURTS AND OTHER OPEN SPACES, AND THE DENSITY OF POPULATION; REGULATING AND RESTRICTING THE LOCATION, USE

Exhibit D-1.

AND EXTENT OF USE OF BUILDINGS AND STRUCTURES FOR TRADE, INDUSTRY, RESIDENCE AND OTHER PURPOSES; AND TO REGULATE THE USE OF LAND, ESTABLISHING A BOARD OF ADJUSTMENT, AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.' ''

BE IT ORDAINED BY THE GOVERNING BODY OF THE BOROUGH OF ALLENDALE, AS FOLLOWS:

Section 1, Article 6—Parking, of the Ordinance known as "The Zoning Ordinance of Allandale, New Jersey" is hereby repealed and replaced by the following:

This amendment shall be known and designated as Article 6A—Parking.

601. Off-street parking facilities for motor vehicles shall be provided in connection with the use of any property in any zone within the Borough of Allendale where the land or building therein is intended to be used in whole or part as a hotel, theatre, auditorium, restaurant, hospital sanitarium, church, or a place of public assembly, or for any purpose likely to attract persons using motor vehicles. Provision shall be made for usable, off-street parking space for each new dwelling unit.

Such facilities shall be provided for in accordance with the requirements of this ordinance, upon any plans or specifications required to be filed under the provisions of any ordinance of the Borough.

602. LOCATION. Off-street parking facilities shall be located as hereinafter specified.

a. For all residential buildings and for all non-residential buildings in residential zones, required parking shall be provided on the same plot with the building, or on a plot or plots contiguous therewith.

Exhibit D-1.

b. For commercial and all non-residential uses in business zones required parking shall be provided within 300 feet, measured from the most distant point of the parking facility to the nearest point for the building that such facility is required to serve.

c. For industrial uses required parking shall be provided on the same plot with the building.

d. In industrial zones, required parking space shall be provided not less than forty feet from the street. In residential zones, parking space shall be behind the set-back lines.

603. For a structure used or to be used for retail or wholesale mercantile establishments to be used by the general public, there shall be provided a usable area for off-street parking equivalent to two (2) square feet of parking space for each square foot of gross floor area of such structure.

604. For buildings used or to be used for office or professional purposes, there shall be provided a usable area for off-street parking equivalent in area to one (1) square foot of parking space for each square foot of gross floor area of that portion of such structure used for office or professional purposes.

605. For buildings intended to be used in whole or part as a theatre, auditorium, restaurant, hospital sanitarium, church or other place of public assembly or any similar purpose likely to attract a number of persons using motor vehicles, there shall be provided a usable area for off-street parking for one motor vehicle for each three seats installed or usable in the portion of such building used for any of the purposes stated in this section, plus one space for each person resident on the premises and additional

space equal in number to 75% of the employees of such establishment. Additional parking area shall be provided for any portion used for other purposes as required by the other sections of this ordinance.

In determining seating capacity for computing parking requirements, there shall be counted such seats as are bolted or attached to the floor of the building. If seating capacity shall be of the bleacher type, the capacity shall be determined by allowing 2½ lineal feet of bleacher space as measured on the longitudinal axis of such seats, as one seating space. If there be no permanent seats or bleachers, or if area is provided for portable seats, the calculation for the necessary parking requirements shall be made by the Building Inspector or his authorized or designated representative using the following table as a guide.

PARKING AREA REQUIREMENT

Principal Purpose	Square Feet of Parking Area per Square Foot of Usable Building Area
Assembly with fixed seats	10
Assembly without fixed seats	5
Business buildings	1
Court Rooms	2
Dance halls, lodge rooms	5
Hotel, lodging houses, multi-family dwellings	1
Institutional buildings	1
Storage buildings	0.5

606. NON-RESIDENTIAL OFF-STREET PARKING. Provisions shall be made for two square feet of total parking area for each square foot of gross floor area for all new non-residential buildings or additions to such buildings in all zone districts except as otherwise provided in this ordinance.

Exhibit D-1.

Parking area must be provided to accommodate any commercial vehicles required for conduct of the use. Such area to be in addition to that provided in accordance with this ordinance. The provisions of b, c, d and e of Section 607 of this ordinance shall also apply.

607. PARKING AREAS FOR NON-RESIDENTIAL USE IN RESIDENCE ZONES. Subject to the approval of the Board of Adjustment.

Off-street parking is permitted in the Commercial and Industrial Zones, and in the Residential zones within one hundred and twenty feet on all Commercial and Industrial zones provided such parking areas,

a. Extend continuously from the business or industrial zone,

b. Are provided with a paved surface as prescribed in Section 610,

c. Are bounded where they adjoin residential areas by a curbing of height at least seven inches above the paved surface and which is at least seven feet from the lot boundary.

d. Are landscaped where they adjoin residential areas according to one of the following alternatives:

1. A dense planting of evergreen shrubs or trees at least four feet high, either alone or in combination with a wire or wooden fence.

2. A solid fence of wood or masonry four feet high with the balance of the set-back area attractively landscaped.

e. Are provided with entrances and exits at least ten feet wide, but not more than fifteen feet wide and preferably separate from each other. If not physically separated, the entrance way and exit shall be clearly indicated by appropriate painted pavement markings.

Exhibit D-1.

608. (a) "Usable floor area" shall be construed to mean the area open to general public use including the space occupied by counters, display booths, cashier's and office facilities, rest rooms for customers and similar customer uses, but not including the space occupied for heating or ventilating systems; facilities for storing or preparing merchandise for public display, or space permanently designed for use in the operation of the building.

(b) "Gross floor area" shall be construed to mean the total floor area of the building as measured by the interior dimensions contained within the outside walls on all floors.

(c) "Usable area for off-street parking" shall be construed to mean the area set apart for actual parking purposes behind the setback as provided in Section 602, d.

609. An area of 200 square feet, exclusive of driveways, is hereby determined as the minimum space necessary for the parking of a single motor vehicle.

610. In addition to the requirements prescribed in Section 607, all parking areas for non-residential use shall provide,

(a) A four inch surface of concrete, asphalt, bituminous cement, binder pavement, and graded so as to dispose of all surface water.

(b) A concrete curb at least seven inches above the paved surface shall be provided parallel to the street property line and arranged so as to prevent over-hang from any vehicle extending over the paved portion of the sidewalk.

(c) Parking areas adjoining buildings which are for public use should be separated from the building by a sidewalk five feet in width bounded by a concrete curb at least seven (7) inches above the paved surface.

Exhibit D-1.

(d) No signs, other than "entrance" "exit" or condition of use signs, shall be maintained.

(e) Any parking area lighting shall be so arranged as to direct the light away from all adjoining buildings, residence districts, or streets.

(f) Off-street parking areas shall be used solely for the parking of vehicles and no commercial repair work or service of any kind shall be conducted on such parking lots.

611. Upon completion of any non-residential parking area complying with the provisions of this ordinance the Building Inspector shall issue a Use Permit, which shall be revoked if the requirements are no longer complied with. No Occupancy Permit shall be valid in the absence of a valid Use Permit for the required parking area.

No parking space shall be reduced in area when once established without special permit from the Building Inspector, which permit shall only be issued when the reduced area complies with the provisions hereof.

612. Community Parking. The provisions of this Article may be met by participation in a community parking program designed to serve a larger area, provided plans for such community parking have been approved by the Planning Board.

Section 2. This ordinance shall take effect upon passage and publication as required by law.

Oct. 13, 1957.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 579

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES,

Appellant,

vs.

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

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MAY IT PLEASE THE COURT:

It is stated by appellees that the jurisdictional statement of appellant does not present to this Court a substantial question as to the constitutionality of the Allendale Zoning Ordinance requiring off-street parking for places of assembly in the Borough of Allendale. The position taken by the appellees on the validity of the ordinance in question is in

conflict with *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 415-416 (1922). This decision by this Court was relied upon by the Supreme Court of Colorado in *City and County of Denver* v. *Denver Buick, Inc.*, No. 18699, December 5, 1959, — P. 2d —, where the court said:

"Questions to be Determined

"First. *Where a zoning ordinance of a municipality contains provisions which purport to require the installation of off-street parking facilities by the owner of land as a condition which must be fulfilled before such owner will be permitted to make use of his land for business purposes authorized in the district within which the land is located; are such provisions unconstitutional when tested by the due process clause of the state and federal constitutions and by Article II, Section 15, of the State Constitution which provides, inter alia, that 'private property shall not be taken or damaged, for public or private use, without just compensation'?*

"We answer this question in the affirmative, and hold that such provisions are repugnant to each of said constitutional guarantees. We think it essential to again state some basic principles of constitutional law to which we are indebted as a nation of freedom loving people, and to which we must steadfastly adhere if individual freedoms and liberties are to survive.

. . . . . .

It is the unquestioned duty and responsibility of the judicial branch of government, through the decision of controversies which come before it, to safeguard and maintain the constitutional provisions which guarantee the maximum free and unrestricted use of property by the citizen, and to strike down those enactments which unreasonably and unnecessarily fasten upon him new restraints upon freedom of action in the use and enjoyment thereof.

. . . . . .

"The legal effect of the argument of the City is that it has a problem of concentration of traffic in the streets and that accordingly there is a right, under the zoning ordinance, to appropriate for off-street parking substantial portions of property of citizens desiring to use that property for a legitimate purpose, and to prohibit the use of that property for any purpose until its owners devote a substantial portion thereof to parking; and this despite the fact that in District B-5 which is in all respects similar to B-6 in general usage, no such requirement exists. No such power exists in the city thus to take private property for a public purpose without compensation to the owner for the taking. It would be quite as proper to argue that the city had the right, under the guise of 'zoning' to require dedication of private property for the street itself, if it were considered that a given street was generally inadequate to carry the traffic; and to prohibit the use of property for any legitimate purpose until such dedication was made. If it be true that a traffic problem exists, it cannot be legally solved by confiscation of private property without compensation, under a pretense of 'zoning.'

"The alert business man as a matter of voluntary action fully realizes the advantages which are to be gained by affording parking facilities to his customers. However, he cannot be compelled to do so under penalty of forfeiting the right to make a beneficial use of his property. The city has ample power to control the 'congestion of traffic' by adoption of regulations adequate for the purpose, which are directly related to that problem. Compulsory, involuntary off-street parking maintained at the expense of a property owner as a price tag or tribute for the exercise of the constitutional right to do business, is 'completely out of harmony with the American constitutional concept of fundamental freedoms and liberties.' It has no definite or substantial tendency to promote or protect those objectives which form the basis of police power."

See also the concurring opinion of Mr. Justice Frantz, where it is stated:

"Justification of this zoning ordinance in the name of progress, and on the theory that the Constitutions, Federal and state, are flexible enough to sustain it, is not in my opinion warranted. All too frequently acceptance of legislation is urged because it represents progress, and because the flexibility of both Constitutions allegedly has come to mean documents of boundless accommodation, Protean in their adjustments. Beguiling indeed are these notions, and hence their advancement as arguments for a proposition should be scrutinized and analyzed with care."

Mr. Justice Frantz in his concurring opinion cites *Greenberg* v. *City of New Rochelle*, 129 N. Y. S. 2d 691, affm'd 134 N. Y. S. 2d 593, appeal dismissed 308 N. Y. 736, 124 N. E. 2d 716; *Property Owners Ass'n, etc.* v. *Board of Zoning Appeals*, 123 N. Y. S. 2d 716. Concerning the latter case the justice quoted from the syllabus, as follows: "Great increase in traffic and parking on village streets, if a college were granted permission to erect seating stands adjacent to its athletic field in village, were probleins for police, not village zoning authorities."

It is respectfully submitted that the decision of the court below is in direct conflict with *City and County of Denver* v. *Denver Buick, Inc.*, No. 18699, December 5, 1959, — P. 2d —; and *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954). This case was referred to in the jurisdictional statement filed in this case at pages 10, 13. This conflict of decision warrants this Court in noting jurisdiction in this case. (Stern and Gressman, *Supreme Court Practice*, page 141, Washington, D.C., Bureau of National Affairs, Inc., 1954) This Court should also note jurisdiction because of the conflict in principle between the decision of the court below and *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 415-416 (1922).

CONCLUSION

WHEREFORE, for the reasons stated in the jurisdictional statement and in this brief opposing motion to dismiss, this Court should note jurisdiction.

Respectfully submitted,

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January, 1960